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Khaw Eng Peng v Goh Aik Lai

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1951–11 OF 2014
DAVID WONG, UMI KALTHUM AND HASNAH HASHIM JJCA
19 JUNE 2019

C *Tort — Defamation — Libel — Defamatory words uttered/published by defendant against plaintiff — Whether impugned words were defamatory of plaintiff — Whether defence of qualified privilege available to defendant*

D This was an appeal by the appellant ('defendant') against the decision of the High Court in allowing the respondent's ('plaintiff's') claim against him for defamation, an injunction from further publication, and an award for general, aggravated and exemplary damages, which claim arose from the disciplinary proceedings/independent inquiry held against the plaintiff's sister, Goh Mooi Teng ('GMT'). The plaintiff was at the material time the deputy managing E director of a listed company known as Oriental Interest Bhd ('OIB'). GMT was also employed at OIB as a purchasing officer. Their father, Goh Cheng Hock ('GCH'), was the managing director of OIB. The defendant was the group accountant of OIB. An independent inquiry into charges of misconduct F against GMT was held where the defendant was the prosecuting officer. The inquiry was presided by a panel comprised of three independent directors of OIB. Five charges were brought against GMT. At the conclusion of the inquiry, GMT was found to be not guilty of the five charges. The plaintiff had received a copy of the notes of evidence of the inquiry. From the said notes, the plaintiff G came to know that the defendant had in the said inquiry produced his two letters and one of GCH's letter as well as the OIB Board's attendance list with the defendant making unsubstantiated comments beyond the contents of those letters and attendance list. The plaintiff claimed that those comments were directly or indirectly concerning him and had defamed him; that the said H letters and attendance list were not relevant to the charges against GMT; that the defendant was motivated by malice in tendering the same; and that the defendant had conspired behind the scene to prevent the plaintiff from succeeding his father as the managing director of OIB. Despite the plaintiff issuing a notice before action to the defendant, the defendant refused to I apologise nor complied with the terms of the notice. Hence this action was instituted by the plaintiff. Aggrieved by the decision of the High Court in allowing the plaintiff's claim, the defendant appealed to this court. The plaintiff filed a cross-appeal seeking a higher award for general, aggravated and exemplary damages.

Held, allowing the appeal and dismissing the cross-appeal:

(1) The impugned words were not defamatory of the plaintiff. Those words published/uttered by the defendant must be seen in context of the inquiry held against GMT. Since the charges against GMT pertained to an ongoing family feud, the exhibits invariably would refer/make references to the plaintiff, who was then the deputy managing director of OIB. The learned High Court judge had erred when he failed to take into consideration the fact that the charges against GMT would involve the tendering of evidence that would invariably implicate the plaintiff. As for the other three factors which the learned judge took into account in finding the defendant had defamed the plaintiff the court found them to be not constituting the impugned words as defamatory (see paras 25–26).

(2) The defence of qualified privilege was open to the defendant. The independent inquiry was an occasion where qualified privilege would apply. The letters written by the plaintiff and his father were tendered to suggest that GMT was aware of these letters and their contents, as the plaintiff was her brother, she was aware of the power struggle, and that her husband was mentioned by name in one of the letters. This indicated that the letters were relevant and the defendant, as the prosecuting officer, was duty bound to tender them as much as the panel was duty bound to receive communication of them, notwithstanding the fact that the panel later found these letters to be insufficient proof against GMT (see paras 27 & 30).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan') terhadap keputusan Mahkamah Tinggi dalam membenarkan tuntutan responden ('plaintif') terhadapnya kerana fitnah, injunksi daripada penerbitan selanjutnya, dan award ganti rugi am, teruk dan teladan, yang mana tuntutan timbul daripada prosiding tatatertib/inkuiri bebas yang diadakan terhadap kakak plaintif, Goh Mooi Teng ('GMT'). Plaintif adalah pada masa material timbalan pengarah urusan syarikat tersenarai dikenali sebagai Oriental Interest Bhd ('OIB'). GMT juga bekerja di OIB sebagai pegawai pembelian. Bapa mereka, Goh Cheng Hock ('GCH'), adalah pengarah urusan OIB. Defendan adalah akauntan kumpulan OIB. Inkuiri bebas terhadap dakwaan salah laku terhadap GMT diadakan di mana defendan adalah pegawai pendakwa. Inkuiri itu dipengerusikan oleh panel yang terdiri daripada tiga pengarah bebas OIB. Lima pertuduhan telah dikenakan terhadap GMT. Pada akhir siasatan, GMT didapati tidak bersalah atas lima pertuduhan tersebut. Plaintif telah menerima salinan nota keterangan siasatan. Dari nota-nota tersebut, plaintif mengetahui bahawa defendan dalam inkuiri tersebut mengemukakan dua surat dan satu surat GCH serta senarai kehadiran Lembaga OIB dengan defendan membuat ulasan yang tidak berasas di luar kandungan surat dan senarai kehadiran. Plaintif mendakwa bahawa

komen-komen tersebut secara langsung atau tidak langsung berkenaan dengannya dan telah memfitnahnya; bahawa surat dan senarai kehadiran tersebut tidak berkaitan dengan tuduhan terhadap GMT; bahawa defendan didorong oleh niat jahat dalam mengemukakan yang sama; dan bahawa defendan telah berkomplot di belakang tabir untuk mencegah plaintif daripada menggantikan ayahnya sebagai pengarah urusan OIB. Walaupun plaintif mengeluarkan notis sebelum tindakan kepada defendan, defendan enggan memohon maaf dan tidak mematuhi terma notis itu. Oleh itu tindakan ini dimulakan oleh plaintif. Terkilan oleh keputusan Mahkamah Tinggi dalam membenarkan tuntutan plaintif, defendan merayu kepada mahkamah ini. Plaintif memfailkan rayuan silang untuk mendapatkan award yang lebih tinggi untuk ganti rugi am, teruk dan teladan.

Diputuskan, membenarkan rayuan dan menolak rayuan silang:

(1) Kata-kata yang dipersoalkan itu tidak memfitnah plaintif. Perkataan-perkataan yang diterbitkan/diucapkan oleh defendan harus dilihat dalam konteks inkuiri yang diadakan terhadap GMT. Memandangkan pertuduhan terhadap GMT berkaitan dengan persengketaan keluarga yang berterusan, ekshibit merujuk/membuat rujukan kepada plaintif, yang ketika itu merupakan timbalan pengarah urusan OIB. Hakim Mahkamah Tinggi yang bijaksana terkhilaf apabila beliau gagal mempertimbangkan hakikat bahawa pertuduhan terhadap GMT akan melibatkan pengemukaan keterangan yang akan sentiasa melibatkan plaintif. Berkenaan tiga faktor yang lain yang dipertimbangkan oleh hakim yang bijaksana dalam mendapati defendan telah memfitnah plaintif mahkamah mendapati ia tidak menjadi perkataan yang dipersoalkan sebagai fitnah (lihat perenggan 25–26).

(2) Pembelaan perlindungan bersyarat terbuka kepada defendan. Inkuiri bebas adalah suatu masa dimana perlindungan bersyarat akan terpakai. Surat-surat yang ditulis oleh plaintif dan bapanya telah dikemukakan untuk mencadangkan bahawa GMT menyedari surat-surat dan kandungannya, oleh kerana plaintif adalah abangnya, dia sedar akan persaingan, dan suaminya telah disebut namanya dalam salah satu surat. Ini menunjukkan bahawa surat-surat itu relevan dan defendan, sebagai pegawai pendakwa, adalah terikat untuk mengemukakannya sebagaimana panel terikat untuk menerima komunikasi mereka, walaupun fakta bahawa panel kemudiannya mendapati surat-surat ini sebagai bukti yang tidak mencukupi terhadap GMT (lihat perenggan 27 & 30).]

Cases referred to

Adam v Ward [1917] AC 309, HL (refd)

Chong Swee Huat & Anor v Lim Shian Ghee (t/a L & G Consultants & Education Services [2009] 3 MLJ 665, CA (refd)

Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492, HC (refd)
Jones v Skelton [1963] 3 All ER 952, PC (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)

Appeal from: Civil Suit No 22–460 of 2008 (High Court, Pulau Pinang)

YC Wong (Ranjit Singh and Elson Beh with him) (YC Wong & Co) for the appellant.
Karin Lim Ai Ching (A Suppiah with her) (Presgrave & Matthews) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] This was an appeal by the appellant/defendant against the decision of the High Court dated 31 October 2014, allowing the respondent's/plaintiff's claim against him for defamation, an injunction from further publication, and an award for general, aggravated and exemplary damages, which claim arose from the disciplinary proceedings/independent inquiry held against the plaintiff's sister, Goh Mooi Teng ('GMT').

[2] Aggrieved by the decision of the High Court, the appellant/defendant appealed to this court. The plaintiff/respondent filed a cross-appeal seeking a higher award for general, aggravated and exemplary damages.

[3] For the purposes of this appeal, parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[4] The plaintiff was at the material time the deputy managing director of a listed company known as Oriental Interest Bhd ('OIB'). The plaintiff's sister, GMT, was also employed at OIB as a purchasing officer. Their father, Goh Cheng Hock ('GCH'), was the managing director of OIB.

[5] The defendant was the group accountant of OIB. An independent inquiry into charges of misconduct against GMT was held on 8 August 2006, where the defendant was the prosecuting officer. The inquiry was presided by a panel comprised of three independent directors of OIB, namely, Ahmad bin Abdul Rashid, Chin Kuet Sen, and Gee Kok Sang (SP2). Notes of the inquiry were taken down by Shahnaz Zuriati bt Sabri, a solicitor (SP3/the recorder).

[6] The five charges brought against GMT were:

(a) acting beyond the scope of duties of employment by interfering or attempting to interfere with the succession plan of the top management of the company, particularly on persistent soliciting support through both the chairman and his wife, Datin Sharifah Mahiran bt Syed Kechil, on the appointment of a new managing director replacing the existing incumbent Mr Goh Cheng Hock;

(b) acting insubordination to superior threatening the General Manager, Mr Goh Aik Keong, into submission by compelling him, via short message services (SMS), to restrain managing director ('MD') Mr Goh Cheng Hock, from permitting his wife, Madam Khoo Phaik Imm, coming to SP office, with the objective of creating rift between the GM and the MD in an attempt to sabotage the succession plan with reference to 6(a) above;

(c) acting insubordination to the MD by addressing his wife, Madam Khoo, derogatory name 'Chow Lock' (damned whore), which is not only disrespectful, insulting and defamatory but extremely vulgar in Hokkien dialect, in your SMS to Mr Goh Aik Keong as well as in front of other employee of the company;

(d) acting against stable and harmonious culture and atmosphere of the company by creating office politics among senior management of the company with regard to 6(a) and 6(b) above; and

(e) bringing family affairs into the company and creating animosity among the top management of the company in relation to 6(b) and 6(c) above.

[7] At the conclusion of the inquiry, GMT was found to be not guilty of the five charges, but the panel recommended she be reprimanded and transferred to another OIB office as her behaviour and conduct had caused the OIB headquarters to no longer be a conducive place for her to work.

[8] The plaintiff had received a copy of the notes of evidence of the inquiry sometime in June of 2008. From the said notes, the plaintiff came to know that the defendant had in the said inquiry produced his two letters and one of his father's/GCH's letter as well as the OIB board's attendance list marked respectively as exhs P3, P4, P5 and P6, with the defendant making unsubstantiated comments beyond the contents of those letters and attendance list. The plaintiff claimed that those comments were directly or indirectly concerning him and had defamed him; that the said letters and attendance list were not relevant to the charges against GMT; that the defendant was motivated by malice in tendering the same; and that the defendant had conspired behind the scene to prevent the plaintiff from succeeding his father as the managing director of OIB.

[9] According to the plaintiff, the sting of the defamatory words uttered/published by the defendant and of his conduct against the plaintiff based on the notes of inquiry are as follows: **A**

(a) the defendant had made reference to the two letters written by the plaintiff (exhs P3 and P4) and had spoken and published as follows: **B**

> KEP [the Defendant] refer to P4 paragraph 2 wish to put on record that 'Cheng Seang' mention therein is GMT's husband and Mr Goh Aik Lai the author of the two documents is GMT's younger brother. P3 and P4 show the intention of Mr Goh Aik Lai way back in 2004, to manage OIB. These letters addressed to the recipient are perceived by the recipients as asking them to step down.; **C**

(b) the defendant had tendered GCH's letter (exh 5) and had spoken and published as follows:

> P5 shows that Mr Goh Cheng Hock in this own words indicates that he perceive the two letters as asking him to step down.; **D**
>
> Over time, I discovered a series of calculated moves by her and her conspirators, whom are my son and son-in-law, aiming to overthrow my position and snatch my controlling interest in a number of private companies as well as OIB, in which I have direct and/or deemed interest. Obviously, I was saddened by their actions, but trying to keep it within the family in the hope that time will change their behavior.; **E**
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> *Mr Goh Aik Lai* (my son)
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> (i) Through a letter, dated 21 September 2004, to Dato' Haji Thobrani Bin Haji Hanafi, the Chairman of OIB, which cc copy to Mr Koay Leong Eng, an Executive Director of OIB, and myself; Goh Aik Lai told us in a very blunt manner that, in his opinion, all of us should vacate office immediately, due to our incompetence at present age, in enabling him to have full control of the Group. **F**
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> (ii) Misled Dato' Chairman in a letter dated 13 May 2006 with false claim that I have given my blessing for him to be my successor designate as MD of OIB Group. **G**
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> *Mr Ooi Chen Seng* (my son-in-law)
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> (i) Pestering Dato' Chairman repeatedly with phone calls, in an attempt to solicit his support for Goh Aik Lai replacing me as MD of OIB Group. **H**
>
> (ii) Misled Mr Goh Cheng Guan, my elder brother, and others shareholders of OIB and my other private companies with false claim that I have consented to Goh Aik Lai assuming the position of MD in all companies, including OIB Group.; **I**

(c) when exh P6 was tendered, the defendant (at p 4, para 13 of the notes of evidence) stated as follows:

KEP tendered company's attendance list which is marked P6. Attendance dated 1 day before incident. Goh Aik Keong has never attended such meeting. Goh Aik Keong's presence indicate urgency that there will be a change in succession plan. Further, SMS sent to Datin at such time of the day shows urgency.

[10] Based on the above words uttered/published by the defendant, the defamatory words were meant and understood to mean that:

(a) the plaintiff was a very ambitious and ruthless person who wanted to topple/overthrow the managing director of OIB, being his own father and to take over the position of managing director of OIB and all the other private companies in which the Goh family has an interest and which were managed by GCH;

(b) the plaintiff was impatient and not willing to wait for the managing director to step down before assuming the post of managing director according to the succession plan of OIB;

(c) the plaintiff was actively conspiring with his sister and brother-in-law to topple the managing director;

(d) the plaintiff had no respect for his father and his father's business acumen, vision and experience and his (the plainitff's) sole aim was to be the managing director by any means;

(e) the plaintiff was not a suitable person for the post of managing director of OIB and that he was not fit to succeed his father's post of managing director of OIB and therefore there was an urgent need to change the succession plan and to replace the plaintiff's own brother, Goh Aik Keong, as the successor for the post of managing director of OIB upon GCH stepping down as the managing director of OIB; and

(f) the plaintiff is a person of dishonorable/discreditable conduct/motive.

[11] As a consequence of the said defamatory words, the plaintiff claimed that:

(a) his reputation has been seriously damaged, he has suffered considerable distress, anxiety and embarrassment; and

(b) he had expected to succeed to the position of the managing director of OIB as he was next in time to be appointed to that position, but instead he was not even elected as a director of OIB despite being recommended by the Board of OIB to be reappointed as the Deputy Managing Director in November 2006. The Defendant was instead appointed as director of OIB at end of 2007.

[12] Despite the plaintiff issuing a notice before action to the defendant, the defendant refused to apologise nor complied with the terms of the notice. Hence this action was instituted by the plaintiff.

[13] In his defence, and praying that the plaintiff's claim be struck off, the defendant averred that:

(a) he was duly appointed by the OIB Group of companies to be the prosecuting officer in respect of the inquiry against GMT;

(b) the words alleged to have been spoken and published by the defendant were not exactly what he had said verbatim, alternatively, the defendant denied that those words bore or understood to bear or are capable of bearing any defamatory meaning of the plaintiff; the defendant also alternatively averred that those words are true in substance and in fact;

(c) he was authorised by the OIB Group of companies to tender the attendance list and P3, P4, P5 and P6 were admitted in evidence at the inquiry proceedings;

(d) he denied that there was any conspiracy against the plaintiff, and that he was not motivated by malice; and

(e) he was under a legal and/or moral duty to publish the said words to the members of the board of inquiry and the members of the board of inquiry had the like duty and/or interest to receive them, hence the publication of those words was an occasion of absolute privilege or alternatively of qualified privilege.

BEFORE THE HIGH COURT

[14] The learned High Court judge allowed the plaintiff's claim and ordered the following:

(a) the defendant shall pay the plaintiff the sum of RM400,000 as general damages with interest at 4%pa from the date of the publication of the defamatory words (8 August 2006) until full settlement;

(b) the defendant shall pay the plaintiff the sum of RM100,000 as aggravated and exemplary damages with interest at 4%pa from the date of the publication of the defamatory words (8 August 2006) until full settlement;

(c) an injunction restraining the defendant whether by himself, his servants or agents or otherwise, from further publishing or causing to be published the defamatory words or similar words defamatory of the plaintiff; and

(d) the defendant shall pay costs to the plaintiff in the amount of RM50,000.

[15] The High Court judge was of the view that there were three main issues that would dispose of the action. All the other issues raised by parties would be consequential to the determination of those issues.

[16] The High Court judge identified the first issue as whether the defendant had defamed the plaintiff by his conduct of tendering the letters dated 21 September 2004 (P3) and 13 May 2006 (P4) written by the plaintiff, another letter dated 25 May 2006 (P5) written by GCH, and the attendance list of the board of directors of OIB (P6), during the course of the independent inquiry held on 8 August 2006, as well as the remarks made/published when tendering those documents.

[17] The learned High Court judge in the first place found that the notes of evidence were recorded in verbatim manner and that the said notes were truly uttered by the defendant based on the evidence of SP3, a lawyer and who had recorded the notes of proceedings of the inquiry, and the evidence of SP2 who was one of the panel members of the inquiry. The learned judge also found that the plaintiff's suit was not barred by laches. He also found that the impugned words were uttered by the defendant in the presence of the panel members, the recorder and GMT, and therefore the defendant had published those impugned words and that the letters and the defendant's deductions and conclusions in relation to the letters did indeed refer to the plaintiff. The learned judge then also concluded that those remarks were defamatory as:

(a) the plaintiff was not the one who was charged before the panel of inquiry and not the subject matter of the inquiry;

(b) the plaintiff 's letters were found by the panel to be irrelevant to the charges against GMT;

(c) those remarks by the defendant 'that those letters addressed to the recipient are perceived by the recipients as asking them to step down' were the defendant's own words and not found in the plaintiff's letters;

(d) based on SP2's evidence, the defendant was not authorised to produce the attendance list;

(e) the defendant's failure to call Koay Leong Eng, his superior, whom the defendant alleged had authorised the defendant to produce the attendance list and to make any statement relating to it; and

(f) the defendant's failure to verify the truth and veracity of GCH's letter when he was at the material time still alive.

[18] The second issue identified was whether the words uttered or published by the defendant were directly or indirectly concerning the plaintiff in their natural and ordinary meaning, and could be understood to mean that:

(a) the plaintiff was a very ambitious and ruthless person;

(b) the plaintiff was impatient;

(c) the plaintiff was actively conspiring with his sister and brother-in-law;

(d) the plaintiff had no respect for his father;

(e) the plaintiff was not a suitable person for the post of managing director; and

(f) the plaintiff was a person of dishonourable or discreditable conduct.

[19] After referring to decided cases, especially *Jones v Skelton* [1963] 3 All ER 952, the learned High Court judge made a finding that the impugned words in their natural and ordinary meaning were capable of being construed to mean that the plaintiff was:

(a) very ambitious;

(b) impatient;

(c) actively conspiring with his sister;

(d) had no respect for his father;

(e) not suitable for managing director; and

(f) a person of discreditable conduct.

[20] The learned High Court found that the third issue to be determined was whether the defendant was entitled to rely on the defence of absolute privilege, or qualified privilege, or justification.

[21] The learned High Court judge made a finding that the defence of absolute privilege was not available to the defendant as the independent inquiry/fact-finding panel was not one that was established under any statute. We had no problem in agreeing with the learned High Court judge on this issue.

[22] The learned High Court judge also found that the defence of qualified privilege was also not available to the defendant as the defendant was not under any legal or moral obligation to produce the letters and make the remarks, the panel was not interested in the said letters and their contents, the said letters were not relevant to the charges against GMT, and the truth and veracity of the contents of the letters had not been properly verified. For the same reasons, the learned High Court judge found that the defence of justification was not be available to the defendant.

A THE APPEAL

[23] The defendant's appeal was premised on the fact that the impugned words attributed to him were not defamatory of the plaintiff, and even if those impugned words were defamatory of the plaintiff, the defendant was protected B from this suit by reason of qualified privilege being attached to the tendering of documents and publication of his remarks made during the independent inquiry as he had a duty to communicate with the panel and the panel likewise had a duty to receive such communication.

C **[24]** The plaintiff in turn had filed a cross-appeal, seeking for the High Court order to be varied. The plaintiff sought for an increase in the sum awarded for general, aggravated and exemplary damages considering:

(a) the publication of the defamatory words led to the plaintiff's non D re-election as a director despite being recommended as one;

(b) the defendant did not establish the defence of justification, and it is trite law that when a party fails to do so damages would multiply;

(c) the defendant had shown no remorse and did not apologise to the E plaintiff for defaming him; and

(d) the defendant had profited from defaming the plaintiff as he was appointed as a director at the expense of the plaintiff who was not re-elected.

F DECISION OF THE COURT

[25] It is trite law that in any action for libel the plaintiff must prove that the matter complained of is:

G (a) defamatory;

(b) has been published to a third person; and

(c) refers to the plaintiff (see *Chong Swee Huat & Anor v Lim Shian Ghee (t/a L & G Consultants & Education Services* [2009] 3 MLJ 665 (CA)).

H

Before us, it was not disputed that the impugned words had been published to members of the panel of inquiry, the recorder and GMT and that those words did refer to the plaintiff. We, however, contrary to the finding by the learned High Court judge, found that the impugned words were not defamatory of the I plaintiff. Those words published/uttered by the defendant must be seen in context of the inquiry held against GMT, who was charged for essentially misconduct by bringing in family problems/disagreements into OIB's company's business (see sub-paras 6(a)–6(e) above). Thus, as the prosecuting officer appointed by the OIB Group of companies in respect of the inquiry

against GMT, the defendant saw it fit to tender exhs P3, P4, P5 and P6 as proofs of the charges against GMT. Since the charges against GMT pertained to an ongoing family feud involving GCH, the father of GMT/plaintiff and their stepmother, these exhibits invariably would refer/make references to the plaintiff, who was then the deputy managing director of OIB. This could be seen more so in the plaintiff's father's/GCH's letter dated 25 May 2006 (P5) to the management of OIB for the attention of Mr Koay Leong Eng, and which we have quoted in sub-para 9(a) above.

[26] The learned High Court judge had erred when he failed to take into consideration the fact that the charges against GMT would involve the tendering of evidence that would invariably implicate the plaintiff, seeing that the underlying factor of those charges being the ongoing family dispute between GCH/his wife (the plaintiff's stepmother) and GMT/plaintiff and the OIB's succession plan. The learned High Court judge instead saw the inquiry as only involving GMT/GMT's conduct in isolation. Not only that, the learned High Court judge had seriously erred when he found that the panel, in their grounds of decision, had found the plaintiff's letters to be irrelevant to the charges against GMT. The following quotation is what the panel stated in regard to the two letters written by the plaintiff in exhs P3 and P4:

> As regard of the Inter-Office Letter dated 21/9/2004 [P3] and 13/5/2006 [P4] respectively, GMT claimed she was not aware of it is existence and she therefore should not be connected to [it] [sic] at all. Mr Khor Eng Peng (KEP) argued that the name Mr Chiang Seng (CS) which was mentioned in Mr. Goh Aik Lai (GAL) letter dated 13/5/2006 is GMT's younger brother so by blood relation it is safe to assume that she should be aware of the said letter. Mr Khor Eng Peng (KEP) argued the two (2) letter show the intention to Mr Goh Aik Lai (GAL) way back in 2004 to manage OIB and this letter addressed to the recipient perceived by the recipient as asking them to step down.
>
> We perused both letters written by Mr Goh Aik Lai. We are of the opinion the content of the letters concentrated on the Mr Goh Aik Lai (GAL) personal assessment of the ability of the founding members of the OIB and his proposal to future plan of OIB.
>
> The next question we ask our self whether GMT had the knowledge as regard to the content of the two (2) letters and acted upon it.
>
> *We found no strong evidence directly or indirectly to show that GMT knew the content of the letter and acted upon it. Mr Khor Eng Peng (KEP) brought our attention to the facts that Mr Chiang Seng (CS) which was mentioned in one of the letters is husband of GMT and Mr Goh Aik Lai (GAL) the author of the two (2) document is GMT younger brother. With due respect to Mr Khor Eng Peng (KEP), we could not agree. The mere facts that GMT has family relation with Mr Chiang Seng (CS) and GAL did not prove that she knew the existence of the said two (2) letters.*
>
> *We are of the opinion that for the 1st charge to succeed, it must be proven with conclusive evidence that there must be series of event including persistent act to interferre with*

A *succession plan of the top management*. To our mind one SMS however disturbing cannot constitute misconduct. We therefore found GMT not guilty of the 1st charge. (Emphasis added.)

B Based on the statement by the panel which we emphasised, the panel merely found those two letters as not constituting conclusive evidence that there were series of events to interfere with the succession plan of the top management by GMT and not that they were irrelevant. As for the verification of the truth and veracity of GCH's letter (P5), which the learned judge found the defendant had C failed to do, to our minds P5 speaks for itself and there was no need for the defendant to verify the contents of P5. As for the other three factors which the learned judge took into account in finding the defendant had defamed the plaintiff (see sub-paras 17(c), 17(d), 17(e) above) we found them to be not constituting the impugned words as defamatory. After all, the test of what D constitutes defamatory is whether the impugned words have lowered the plaintiff in the estimation of the right thinking members of society. *Gatley on Libel and Slander* (11th Ed) at p 37, para 2.1, states as follows:

> The difficulty of producing a comprehensive definition of the meaning of 'defamatory' has often been remarked, and the following have been offered at E various times, namely that a defamatory imputation is one to the claimant's discredit; or which tends to lower him in the estimation of others; or causes him to be shunned or avoided; or exposed him to hatred contempt or ridicule ...

At p 46, para 2.7:

F

> *2.7 Words lowering a person in the estimation of others* ... Any imputation is defamatory if it would tend to lower the claimant in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally ...

G

[27] Even if we were wrong in finding that the impugned words were not defamatory, we nevertheless found that the defence of qualified privilege was open to the defendant. we agreed with the defendant's submission that the independent inquiry was an occasion where qualified privilege would apply. H *Gatley on Libel and Slander*, (11th Ed) at p 476, para 14.36 states as follows:

> Participants in proceedings of a court or of a tribunal recognised by law having the characteristics of a court enjoy absolute privilege. But participants in a wide range of other proceedings ... are recognized as having a duty to say what they know in relation to matters relevant to those proceedings and publications in the course of I the proceedings are therefore made on an occasion of qualified privilege.

[28] In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492 at p 508 Harmindar Singh JC (as he then was) in explaining a situation where qualified privilege would apply, adopted the

House of Lords' decision in *Adam v Ward* [1917] AC 309 where Lord Atkinson held:

> A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is so made, and the person to whom it is so made had a corresponding interest or duty to receive it. This reciprocity is essential.

Futher, in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 (SC) at p 178, paras C–E, left, where Wan Hamzah SCJ stated:

> there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v Longsdon*. These occasions are called occasions of qualified privilege. A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable ...

[29] The independent inquiry was held to determine whether or not GMT was guilty of the five charges against her. The charges mainly centered on her involvement in interfering with a succession plan relating to her brother, the plaintiff.

[30] It was the defendant's position that the letters written by the plaintiff and his father were tendered to suggest that GMT was aware of these letters and their contents, as the plaintiff was her brother, she was aware of the power struggle, and that her husband was mentioned by name in one of the letters. This indicated that the letters were relevant and the defendant, as the prosecuting officer, was duty bound to tender them as much as the panel was duty bound to receive communication of them, notwithstanding the fact that the panel later found these letters to be insufficient proof against GMT.

CONCLUSION

[31] For the reasons stated above, we unanimously allowed the appeal of the defendant/appellant and consequently dismissed the plaintiff's/respondent's cross-appeal with costs of RM75,000 for here and below, subject to allocatur fees. We therefore set aside the order of the High Court dated 31 October 2014, and ordered the respondent to pay the appellant RM718,273.97 (being the judgment sum awarded in the High Court) with interest at 4%pa from 12 February 2015, within seven days from 9 May 2016. The deposit to be refunded.

Appeal allowed and cross-appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh